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JAMES R. BROWNING, C

# In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 894

STATE BOARD OF EQUALIZATION, an agency of the State of California,
*Petitioner,*

vs.

GOUGH INDUSTRIES, INC., a corporation,
*Respondent.*

## Petition for a Writ of Certiorari to The Supreme Court of the State of California

STANLEY MOSK
Attorney General of California

JAMES E. SABINE
Assistant Attorney General

ERNEST P. GOODMAN
Deputy Attorney General

600 State Building
San Francisco 2, California

*Attorneys for Petitioner,*
*State Board of Equalization.*

PARKER PRINTING COMPANY, 150 FIRST STREET, SAN FRANCISCO 5

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vs.

GOUGH INDUSTRIES, INC., a corporation,
*Respondent.*

## Petition for a Writ of Certiorari to The Supreme Court of the State of California

The petitioner, California State Board of Equalization, prays that a writ of certiorari issue to review the opinion of the California Supreme Court filed March 13, 1959.

### CITATION TO OPINIONS BELOW

The memorandum opinion of the trial court, which is unreported, is printed in Appendix D *infra*; page 15, and appears at R. Part II, p. 19, and the judgment (R. Part II, p. 35) appears in Appendix D, page 22. The opinion of the California District Court of Appeal for the Third Appellate District is printed in Appendix C *infra*, page 8, and is

reported in 165 Advance California Appellate 722, 332 Pac. 2d 378, and appears at R. Part III; Appendix A. The opinion of the California Supreme Court, printed in Appendix B *infra*, page 3, is reported in 51 Advance California 748, 336 Pac. 2d 161, and appears at R. Part V.

## JURISDICTION

The opinion of the California Supreme Court was filed on March 13, 1959. On April 13, 1959, the California Supreme Court issued its remittitur to the Superior Court of the State of California, in and for the County of Sacramento (R. Part VI; Appendix D, p. 2) and the decision of the California Supreme Court became final (Rule 25(a) of California Rules on Appeal). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The sole issue in this case is whether the "import-export" clause of the United States Constitution (Art. I, § 10, Clause 2) prohibits the State of California from imposing its sales tax with respect to the transactions involved here. The California Supreme Court held the tax could not be imposed, after a decision of the District Court of Appeal, an intermediate appellate court, had sustained the tax.

## QUESTION PRESENTED

The California taxing authorities sought to impose a sales tax with respect to the following transaction: Title to goods purchased passed upon delivery by the seller to a packing firm which was to prepare the goods for shipment abroad. Under California law, sales tax liability arises at the time of transfer of title. The question presented is whether the goods were, at the time of delivery to the packing firm in "export" within the meaning of the import-export clause. Phrased differently, the issue is whether the fact that the

services of the packer were not available at the plant of the seller, but the goods had to be moved approximately 30 miles to the packer, serves to distinguish this case from *Empresa Siderurgica, S.A. v. County of Merced*, 337 U.S. 154.

## STATUTES INVOLVED

The constitutional and statutory provisions involved in this case are Article I, Section 10, Clause 2 of the Constitution of the United States and Sections 6006, 6051, 6091, 6352 and 6387 of the California Revenue and Taxation Code which are printed in Appendix A, *infra*, p. 1.

## STATEMENT OF THE CASE

The evidence submitted in this case consisted entirely of (1) a stipulation of facts (R. Part II, p. 9), (2) documents exemplifying a typical transaction (R. Part VII), and (3) a supplemental stipulation of facts (R. Part II, p. 18).[1] These stipulations and documents showed that in the period April 1, 1949, to December 31, 1949, Gough sold the goods here involved (electrical products) under purchase orders quoting a price f.o.b. Wilmington, California. The purchase orders required Gough to deliver the goods from its plant at Los Angeles to Foreign Trade Export Packing Company

1. On the basis of these stipulations the trial court made certain "findings of fact" some of which are plainly legal conclusions; e.g., that it was true that "Said sales were made in the course of exportation of said tangible personal property and that gross receipts therefrom were exempt from sales tax under the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States * * *" (R. Part II, p. 26) Under California law "findings of fact" of this nature, which are in truth legal conclusions, are not binding upon the appellate courts (*Isenberg v. Calif. Unemployment Stabilization Comm.*, 30 Cal. 2d 34, 180 Pac. 2d 41; *Pacific Pipe Line Co. v. State Board of Equalization*, 49 Cal. 2d 729, 321 Pac. 2d 729; *McNeil v. Board of Retirement*, 51 Adv. Cal. 277, 332 Pac. 2d 281). Furthermore, such conclusionary findings could not preclude review by this Court (*Williams v. North Carolina*, 325 U.S. 226, 236).

(referred to herein as Packer) which was located at Wilmington, California, in the Los Angeles harbor area. The purchase orders indicated that the goods were ultimately to be shipped to Saudi Arabia. Title to the goods passed to the purchasers upon delivery to the Packer at Wilmington, California. The Packer, pursuant to detailed instructions from the purchasers, packed the goods for overseas shipment, and held the goods awaiting shipping instructions from the purchasers. These shipping instructions were issued to the Packer by the purchasers within seven to fifty-three days after the goods were delivered by Gough to the Packer and called for delivery of the goods to a steamship company immediately or within a stated period which varied from one to seventeen days (R. Part II, pp. 9-18 inc.).

On January 26, 1953, the respondent, Gough, filed an action in the Superior Court in Sacramento County to obtain a refund of the sales tax which it had paid to the State of California with respect to these transactions. The constitutional issue was raised in the complaint filed by Gough[2] (R. Part II, p. 1) and in the answer filed on behalf of the State Board of Equalization[3] (R. Part II, p. 7). The trial court, in a memorandum opinion, based its decision on its conclusion "that the export journey started when the goods left plaintiff's property and were not subject to California tax" (R. Part II, p. 25). The trial court refused to pass on any questions raised by the respondent other than the constitutional issue (R. Part II, p. 25). The District

2. In paragraph IX of the complaint filed by Gough, it was stated "Said sales were made in the course of exportation of said tangible personal property and the gross receipts therefrom were exempt from sales tax under the provisions of Article I, section 10, clause 2, of the Constitution of the United States. * * *" (R. Part II, p. 5).

3. Paragraph IX of the complaint was specifically denied by paragraph V of the answer filed on behalf of the State Board of Equalization (R. Part II, p. 8).

Court of Appeal reversed the trial court, specifically holding the State *not* constitutionally prohibited from imposing a tax with respect to the sale of the goods in question. It said:

> "Of course it cannot be gainsaid that when the purchasers agreed to buy the goods from the seller they intended to transport the goods to Saudi Arabia for their use there and it stands admitted that this plan was carried out; that the plan included the delivery of the goods by the seller to the packer's plant, the packaging of the goods there, and the subsequent transportation of the goods to the docks for overseas carriage. But the adoption of such a plan and its carrying out is not decisive. Those conditions existed in *Empresa Siderurgica, S.A. v. County of Merced*, 337 U.S. 154, 93 L. Ed. 1276, and in many other cases that might be referred to in which it was held that notwithstanding such conditions the goods in question, not having been delivered to an interstate carrier, had not entered the stream of export and attained immunity. We think the decisive facts are these and nothing more. The purchasers bought the goods from the seller and had them delivered to packer under a contract with packer to prepare the goods for export. Therefore, nothing occurred which can be said to have placed the goods in export until the packer had finished with them pursuant to the purchaser's orders and had delivered them to a truck carrier for delivery to the ocean carrier. Therefore, when the goods were delivered to packer and both title and possession passed immunity had not been achieved and the transfer was taxable." (R. Part III, Appendix A, p. iv, Appendix C *infra* p. 11)

The California Supreme Court reached a conclusion contrary to the District Court of Appeal and thereby affirmed the decision of the trial court. It said:

> "The question for us to determine, therefore, is: *Had a continuous export journey begun at, or prior to, the time the goods were delivered to the packer?*

*Yes.* The export journey began when plaintiff delivered the goods to the truck-carrier at its plant. * * *" (R. Part V, p. 3 Appendix B, *infra* p. 4)

The California Supreme Court did not consder or discuss any issues raised by the respondent, Gough, other than the application of Article I, section 10, clause 2 of the United States Constitution to the transactions in question.

## REASONS FOR GRANTING THE WRIT

**I. Certiorari should be granted because the California Supreme Court in holding that goods are exempt from taxation as exports prior to the time they are packed for overseas shipment has reached a conclusion contrary to the holdings of this court from Coe v. Errol, 116 U.S. 517, to Empresa Siderurgica, S.A. v. County of Merced, 337 U.S. 154.**

There is a striking similarity between the facts in the instant case and those in *Empresa Siderurgica, S.A. et al. v. County of Merced,* 337 U.S. 154. In the *Empresa* case, there was a cement plant in Merced County, California, which was sold to *Empresa,* a Colombia corporation, for export to South America. After an export license was obtained and a letter of credit in favor of the seller deposited in the United States, title to the cement plant passed to the purchaser. A company which was a common carrier was employed to do the dismantling and packaging for shipment. As the dismantling proceeded, shipments were labeled with *Empresa's* name as consignee and delivered to a rail carrier.

The County of Merced acting under a California statute[4] levied a personal property tax on the property for the tax year 1945-46. On the tax day, 12 percent of the plant had been shipped out of the country. That portion was relieved

4. Rev. & Tax. Code 1939, Div. I, §§ 103, 106, 201, 202(e), 405.

of the tax. The balance was taxed. The portion taxed included 10 percent of the plant which had been dismantled and *crated or prepared for shipment*, 34 percent which had been dismantled but not crated or prepared for shipment, and 44 percent which had not been dismantled. Before the end of January, 1946, all the property had been shipped by rail to a port and was en route to South America by ocean carrier.

This Court sustained the imposition of the tax under these circumstances. It said:

> "[I]n this case it is not enough that on the tax date there was a purpose and plan to export this property. Nor is it sufficient that in due course that plan was fully executed. The part of the plant that is taxed was dismantled, but it had not been delivered to any carrier for export or otherwise started on its journey on the tax date. It might still have been diverted into the domestic market. The fact that any such diversion would entail a breach of contract, that a part of the plant had already started on its export journey, that an export license had been obtained and a letter of credit deposited in this country increases the expectation on the tax date that exportation of the entire plant would eventuate. But that prospect, no matter how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed." (337 U.S. 154 at 157)

In the instant case, it has been stipulated that the title to the goods passed to the purchasers in California when delivered to the plant of the Packer. The goods were then packed for overseas shipment. It is readily apparent that since items in the *Empresa* case, *which were actually packed and crated for export by the packer* there involved awaiting overseas shipment, were not exempt as exports,

the goods here in question were not exports at the time title passed to the purchasers, i.e., at the time of delivery to the Packer, and *prior to the commencement of the actual packing and crating.*

The California Supreme Court in holding that the goods here involved were in export on delivery to the Packer rejected the standard of the *Empresa* case, and applied a new test of immunity. Thus, the Court said:

> "From the foregoing authorities, it appears that where an article is manufactured and sold in one of the states for export to a foreign country, it is free from state sales tax under the import-export clause of the United States Constitution if at the time title passed the certainty of the foreign destination was plain." (R. Part V, p. 5 Appendix B *infra* p. 6)

It is true that in the instant case the goods were moved from the plant of the manufacturer to the place of business of the Packer. This single fact of movement to the Packer was the basis of the California Supreme Court's distinction of the *Empresa* case. Thus, the Court said:

> "The fundamental difference between the Empresa case and the present one is this: In the Empresa case, the movement of the goods sought to be taxed had not started when the tax was imposed, while in the present case the movement of the goods had started on a continuous journey in foreign commerce from Los Angeles to Saudi Arabia when the tax was imposed". (R. Part V, p. 7, Appendix B *infra*, p. 7).

The fact that here the services of the Packer were not available at the plant of the supplier should not obscure the fact that the delivery to the plant of the Packer was for the purpose of packing goods *preparatory* to exportation. Moreover, in the *Empresa* case there was unquestionably movement of the property there involved in the course

of dismantling the cement plant and packing and crating the component parts thereof preparatory to overseas shipment.

The distinction between preparation for shipment and the actual commencement of the journey and entry into the stream of export was established by this Court in *Coe v. Errol*, 116 U.S. 517 (1886). In that case, this Court said:

> "* * * But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. *The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey.* That is all preliminary work, performed for the purpose of putting the property in a *state of preparation and readiness for transportation.* * * *" (116 U.S. at 528) (Emphasis added.)[5]

It is submitted that the packing of the goods here involved was part of the "preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation." If, as stated by this Court in *Coe v. Errol*, the carrying of goods to the depot where the journey is to commence is no part of the journey, it would certainly follow that the packing of the goods before their transportation to the depot, is even farther removed from the commencement of the journey. Accordingly, the goods here involved were not in export at the time they were delivered to the Packer and the sales tax may be validly applied with respect to the transfer of title at that time. In this regard see also *Cornell v. Coyne*, 192 U.S. 418, *Heisler v. Thomas Colliery Co.*, 260 U.S. 245,

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5. *Coe v. Errol* was relied upon in *Empresa*, where the Court noted that "That test was fashioned to determine the validity under the Commerce Clause of a nondiscriminatory state tax. But * * * it is equally applicable to cases arising * * * under Art. I, § 10, cl. 2 (the Import-Export Clause) * * *." 337 U.S. 154 at 156.

*Federal Compress & Warehouse Co., et al. v. McLean, Sheriff, et al.*, 291 U.S. 17, and *Diamond Match Co. v. Ontonagon*, 188 U.S. 82.

Moreover, under holdings of this Court in cases such as *General Oil Company v. Crane*, 209 U.S. 211, the items here involved would not be exempt from State taxation even assuming for the sake of argument only that the transportation of the goods to Packer was the commencement of their export journey, since the delivery to the Packer was an interruption of that journey sufficient in nature and purpose to constitute a withdrawal of the goods from exportation with a consequent loss of tax immunity.

**II. This case is of great importance not only to the State of California but to all States since it involves the question of immunity from State taxation of goods being prepared for overseas shipment.**

The decisions of this Court have established a rule of relatively simple application as to when goods gain immunity from State taxation. *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, and *Richfield Oil Co. v. State Board of Equalization*, 329 U.S. 69, on which the California Supreme Court relied, stand for the proposition that goods gain immunity when they are delivered to the carrier which furnishes transportation for their ultimate exportation. In other words, the goods must have commenced their actual movement out of the country before they are exempt from State taxation. For example, the rule of these cases is correctly applied in a case not factually distinguishable from this one by the Washington Supreme Court in *Eardley Fisheries Co., Inc. v. Seattle*, 50 Wash. 2d 566, 314 P.2d 393 (1957). (The opinion in the *Eardley* case is set out in full in Appendix E, *infra*, p. 25). See also *Sylvia Ney v. District of Columbia* (D.C. Tax Ct. 1954), C.C.H. State Tax

Reports (D.C.) para. 65-010. Nor do the other decisions of this Court cited by the California Supreme Court in its opinion support the decision in this case. *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U.S. 498, involved the jurisdiction of the Interstate Commerce Commission over a wharf in Galveston, Texas, and *Hughes Bros. v. Minnesota*, 272 U.S. 469, involved a delay because of a change in mode of transportation of logs which were first floated and then carried by steamship. None of these cases involved delivery to an export packer who was to prepare goods for shipment. Thus, the decision of the California Supreme Court threatens to provoke nationwide litigation in this, until now, quiescent area of the law.

It is true that since this case arose, the California Legislature has passed a statute, prospective in operation, specifically exempting from the sales tax goods delivered to an export packer (Cal. Rev. & Tax. Code, § 6387 Cal. Stats. 1955, p. 2746, in effect September 7, 1955).[6] We have found no similar exemption in the statutes of any other state having a sales or use tax. And even in California, the new statute by no means disposes of the problems presented by the opinion of the California Supreme Court. Is the same rule to be applied when goods are delivered to a third party to be prepared for export shipment by being painted, assembled, disassembled, repaired, renovated, etc.? A flood of expensive and unnecessary litigation can be prevented if this Court will review this case.

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6. It should also be noted that if this case is not reversed by this Court the State will be required to refund approximately $600,000 in taxes imposed on sales where title passed on delivery to a packer for preparation for overseas shipment prior to the effective date of the new legislation.

## CONCLUSION

For the reasons discussed above, we respectfully submit that certiorari should issue to review the decision of the Court below.

STANLEY MOSK
Attorney General of California

JAMES E. SABINE
Assistant Attorney General

ERNEST P. GOODMAN
Deputy Attorney General

*Attorneys for Petitioner,*
*State Board of Equalization.*

**(Appendices follow)**

## *Appendix A*

### I. Pertinent Provisions of the California Sales and Use Tax Law (Section 6001 et seq. of the California Revenue and Taxation Code)

*A. Statutes in effect during taxable period i.e., April 1, 1949, to December 31, 1949 (These provisions are still in effect).*

SECTION 6001. This part is known and may be cited as the "Sales and Use Tax Law."

SECTION 6006, so far as here relevant, provides:

"Sale" means and includes:

(a) Any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or any means whatsoever, of tangible personal property for a consideration. "Transfer of possession," "lease," or "rental" includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter.

SECTION 6051. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter.

SECTION 6091. For the purpose of the proper administration of this part and to prevent evasion of the sales tax it shall be presumed that all gross receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale.

SECTION 6352. There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.

*B. Statute in effect September 7, 1955.*

SECTION 6387. There are exempted from the computation of the amount of the sales tax the gross receipts from sales of tangible personal property purchased for use solely outside this State and delivered to a forwarding agent, export packer, or other person engaged in the business of preparing goods for export or arranging for their exportation, and actually delivered to a port outside the continental limits of the United States prior to making any use thereof. (Added by Stats. 1955, p. 2746, in effect September 7, 1955.)

**II. Article I, Section 10, Clause 2 of the United States Constitution**

This Section so far as here relevant provides:

> "No State shall, without the consent of the Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: * * *"

## *Appendix B*

*In the Supreme Court of the State of California*

In Bank—Sac. 6879

Gough Industries, Inc. (a Corporation);
Plaintiff and Respondent,
vs.
State Board of Equalization,
Defendant and Appellant.

### OPINION

Defendant appeals from a judgment awarding plaintiff a refund of sales tax and interest paid under protest.

*Facts:* Plaintiff is a California manufacturer and seller of electrical products. During 1949 plaintiff sold goods to Arabian American Oil Company and Trans-Arabian Pipe Line Company for use in Saudi Arabia. The purchasers requested price quotations from plaintiff and other suppliers. Bidders were informed that all purchases were made strictly for direct export to scenes of operations in foreign countries and that it was anticipated bidders' quotations would show export prices or export discounts applicable. They were also informed that landing and receiving conditions in Saudi Arabia were such that specialized packing was required and that if they could not fulfill these specialized packing requirements with their own facilities, they should so indicate on their quotations.

Plaintiff quoted prices for delivery of the goods to an export packer's plant. The purchasers then submitted an export purchase order requiring that the packages be marked with the name of the port of entry in Saudi Arabia. The purchase order showed that ocean transportation had

been arranged for and that proof of export would be furnished. It also showed a required date of export and a special export number and contained the following condition: "The property hereunder is for export and is to be delivered by you directly to a carrier or a forwarding agent for shipment to a point outside the United States, in accordance with shipping instructions hereafter to be furnished you."

Plaintiff was then instructed to deliver the goods to "Trans-Arabian Pipeline Co., Saudi Arabia, c/o Foreign Trade Export Pack. Co., 445 Figueroa St., Wilmington, Calif. for export packing and forwarding." Plaintiff shipped the goods by truck carrier to the packer. Title passed at the time the goods were delivered to the packer. The packer packed and crated the goods according to the purchaser's specifications and forwarded them by truck carrier to the ocean carrier, which transported them to Saudi Arabia.

As will hereinafter appear, if at the time title passed to the purchaser the goods were goods in export, the proceeds of the sales were not properly includable in plaintiff's retail sales in the determination of the amounts of sales tax assessable against it by the State of California. On the other hand, if at the time title passed the goods were not goods in export, such proceeds were properly includable in plaintiff's retail sales.

The question for us to determine, therefore, is: *Had a continuous export journey begun at, or prior to, the time the goods were delivered to the packer?*

*Yes.* The export journey began when plaintiff delivered the goods to the truck carrier at its plant. The stipulated evidence, all the inference therefrom, and the findings of the trial court establish the continuous and unbroken character of the journey. Therefore, the goods were goods in

export at the time title thereto passed, and the transaction was not subject to the state sales tax.

Article I, section 10, clause 2, of the United States Constitution reads as follows: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspections Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, involved the sale of oil in California to a foreign government, title having passed in this state. The Supreme Court of the United States held that the imposition of a California sales tax on the transaction was unconstitutional under the import-export clause of the United States Constitution set forth above and indicated that the important factor was that at the time of the delivery certainty of the foreign destination was plain.

In Matson Nav. Co. v. State Bd. of Equal., 136 Cal. App. 2d 577 (hearing denied by the Supreme Court), the same conclusion was reached relative to the imposition of a California sales tax on the sale of a steamer sold by the Matson Company to a Panamanian corporation, title having passed in this state.

In Spalding & Bros. v. Edwards, 262 U.S. 66, a Venezuelan firm ordered a New York commission house to buy a quantity of bats and balls for its account. The commission house placed the order with the manufacturer, instructing it to deliver the packages to an exporting carrier in New York for shipment to Venezuela. Title passed when the goods were delivered to the carrier. The Supreme Court held that at that time the goods had been committed to ex-

port and that the tax was therefore invalid under article I, section 9, clause 5, of the Constitution, which prohibits Congress from taxing exports.*

From the foregoing authorities, it appears that where an article is manufactured and sold in one of the states for export to a foreign country, it is free from state sales tax under the import-export clause of the United States Constitution if at the time title passed the certainty of the foreign destination was plain.

In the present case all the contract documents specified the exportation, and all steps in the transportation were carried out without deviation.

The trial court specifically found that the export journey started when the goods left plaintiff's plant in Los Angeles; that it was a continuous journey from Los Angeles to Saudi Arabia; that there was no stoppage in transitu or attempt to cause one, or any delay for an unreasonable length of time; that any delay (if any there were) did not break the continuous stream of foreign commerce; and that all packing and crating by the export packer "was an incidental part of the total export journey rather than the primary station of commencing an export journey to Saudi Arabia."

From the foregoing, it appears that: (a) the agreement of sale contemplated shipment of the goods in export, that is, from a seller in the United States to a buyer in a foreign country; (b) from the beginning of the transaction, the goods were committed to go all the way to the foreign country; (c) the movement of the goods had actually started when the tax was sought to be imposed; and (d) the journey was continuous and unbroken by any action or delay taken for a purpose independent of the transportation of the goods.

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*"Export" has the same meaning under both section 9 and section 10, article I, of the federal Constitution.

Therefore, it is immaterial that the goods were shipped to the packer in Wilmington and there packed for ocean travel, such being incidental and necessary for the safe transportation of the goods (So. Pac. Terminal Co. v. Int. Comm. Comm., 219 U.S. 498, 526-527); or that there was a change in the form of transportation from overland travel by truck to overseas travel by ship, with incidental preparation for the latter (Hughes Bros. Co. v. Minnesota, 272 U.S. 469, 474; So. Pac. Terminal Co. v. Int. Comm. Comm., supra).

Empresa Siderurgica v. Merced Co., 337 U.S. 154, relied on by defendant, is not applicable to the facts in the instant case. In that case a property tax against the purchaser on various parts of a cement plant which had been sold and dismantled for shipping to South America was upheld on (1) parts that were crated and ready for shipment, (2) parts dismantled but not yet packed, and (3) parts not yet dismantled. No tax was levied on parts that had already been shipped.

The fundamental difference between the Empresa case and the present one is this: In the Empresa case, the movement of the goods sought to be taxed had not started when the tax was imposed, while in the present case the movement of the goods had started on a continuous journey in foreign commerce from Los Angeles to Saudi Arabia when the tax was imposed.

The judgment is affirmed.

McCOMB, J.

We Concur:
GIBSON, C. J.
SHENK, J.
TRAYNOR, J.
SCHAVER, J.
SPENCE, J.
WHITE, J. pro tem.

[Endorsed:] Filed Mar 13, 1959 WILLIAM I. SULLIVAN, *Clerk By* *S. F. Deputy*

## *Appendix C*

*In the District Court of Appeal of the State of California*

*In and For the Third Appellate District*

(Sacramento)—3 Civil No. 9421

Gough Industries, Inc. (a Corporation),
Plaintiff and Respondent,

vs.

State Board of Equalization, an agency of the State of California,
Defendant and Appellant.

### OPINION

Plaintiff and respondent, Gough Industries, Inc., herein frequently referred to as Gough, brought this action to recover sales tax and interest in the sum of $1,921.81 from defendant and appellant, State Board of Equalization, herein frequently referred to as the board. From a judgment awarding Gough a refund in the sum specified, the board has taken this appeal.

The case was tried on a stipulation of facts. No other oral or documentary evidence was presented to the court.

The issue presented is whether the State of California may validly include in the measure of the sales tax assessed against Gough sales of tangible personal property made by Gough in this state under the following circumstances: Title to the goods passed to the purchasers at the time the goods were delivered by Gough at Wilmington, California, to a firm, referred to herein as packer, designated by the purchasers which packed the goods for shipment abroad; packer then held the goods awaiting purchaser's shipping

instructions and available shipping space when packer arranged for the transportation of the goods to the dock for overseas shipment. It is the position of the board in this action that when the goods were delivered to packer they were merely being prepared for exportation and had not become exports; that, therefore, the export-import clause of the federal Constitution afforded them no immunity from taxation at the moment of transfer, that is, the moment of delivery to packer. Respondent contends to the contrary and also contends that even if the goods had not at the time of transfer attained immunity their transfer was not taxable because of certain provisions of the Sales and Use Tax Law and of board rulings in force at the time of transfer.

The stipulation of facts may be summarized in the following manner: Respondent Gough is a California manufacturer and seller of electrical products. During 1949 Gough sold goods to Arabian American Oil Company and Trans-Arabian Pipe Line Company for use in Saudi Arabia. The essential steps by which the goods made the journey from Los Angeles to Saudi Arabia were these: The first step was the purchaser's request for price quotations. These requests sent to Gough and other suppliers sought bids based upon export terms. Bidders were informed that all purchases were made strictly for direct export to scenes of operations in foreign countries and that it was anticipated bidders' quotations would show export prices or export discounts applicable. Bidders were informed that landing and receiving conditions in Arabia were such that specialized packing was required and that if they could not fulfill these specialized packing requirements with their own facilities, they they should indicate such to be the fact. The second step was Gough's quotation of prices for delivery of the goods to the export packer's plant, with the notation "export packing extra at cost". The third step was the pur-

chaser's submission of an export purchase order requiring that packages be marked "Ras El Misha'ab", the port of entry in Saudi Arabi. The export purchase order stated that ocean transportation had been arranged for and that proof of export would be furnished. The order also stated a required date of export, a special export, a special export license number and contained the following condition: "The property hereunder is for export and is to be delivered by you directly to a carrier or forwarding agent for shipment to a point outside the United States, in accordance with shipping instructions hereafter to be furnished you." The fourth step occurred when the goods were ready for delivery. In accordance with the terms of the contract, purchasers instructed Gough to deliver the goods "To Trans-Arabian Pipeline Co., Saudi Arabia, c/o Foreign Trade Export Pack. Co., 445 Figueroa St., Wilmington, Calif. for export packing and forwarding." Gough, as directed, sent the goods to packer, which specially packed and crated them for overseas shipment according to the purchaser's specifications. Packer then received notice from the purchasers to forward the goods "To Trans-Arabian Pipeline Co., Ras El Misha'ab, Saudi Arabia, c/o Isthmian SS Co., . . . for Thomas Sim Lee. For export." The ocean carrier received the goods from a truck carrier and delivered them to Saudi Arabia.

The trial court found that the export journey started when the goods left the seller's plant in Los Angeles; that it was a continuous journey from Los Angeles to Saudi Arabia; that there was no stoppage in transit or attempt to cause one or any delay for an unreasonable length of time; that any delay (if any there was) did not break the continuous stream of foreign commerce; and that all packing and crating by the export packer was an incidental part of the total export journey rather than the primary station of

commencement of such a journey. On that basis of these findings, the court concluded that the sales in question were exempt from state taxation under the federal Constitution and that plaintiff was entitled to judgment.

The pivotal point upon which the decision of this case must turn is the validity of the trial court's findings that the export journey began when the goods left Los Angeles en route from the seller to the packer. If so, then the transfer occurred after the goods had attained immunity. If, on the other hand, the journey from the seller's plant to point of delivery at packer's plant was not a part of the export journey of the goods, then the goods had not attained immunity and did not do so until at least they left the packer's plant en route to the docks.

Of course it cannot be gainsaid that when the purchasers agreed to buy the goods from the seller they intended to transport the goods to Saudi Arabia for their use there, and it stands admitted that this plan was carried out; that the plan included the delivery of the goods by the seller to the packer's plant, the packaging of the goods there, and the subsequent transportation of the goods to the docks for overseas carriage. But the adoption of such a plan and its carrying out is not decisive. Those conditions existed in Empresa Siderurgica, S.A. v. County of Merced, 337 U.S. 154, 93 L. Ed. 1276, and in many other cases that might be referred to in which it was held that notwithstanding such conditions the goods in question, not having been delivered to an interstate carrier, had not entered the stream of export and attained immunity. We think the decisive facts are these and nothing more. The purchasers bought the goods from the seller and had them delivered to packer under a contract with packer to prepare the goods for export. Therefore, nothing occurred which can be said to have placed the goods in export until the packer had

finished with them pursuant to the purchaser's orders and had delivered them to a truck carrier for delivery to the ocean carrier. Therefore, when the goods were delivered to packer and both title and possession passed immunity had not been achieved and the transfer was taxable.

Respondent contends that the sales were exempt from taxation under California statutes and administrative regulations. At the time here involved Section 6352 of the Revenue and Taxation Code read as follows:

> "There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State."

There was also in effect an administrative ruling issued by the State Board of Equalization which in material part read as follows:

> "Sales tax does not apply to sales of property which is:
>
> "...
>
> "(c) shipped to a point outside this State, pursuant to the contract of sale, by delivery by the retailer to such point by means of
>
> "(1) facilities operated by the retailer,
>
> "(2) delivery by the retailer to a carrier for shipment to a consignee at such point, or
>
> "(3) delivery by the retailer to a customs broker or forwarding agent for shipment outside this State."

Respondent argues that the purchase orders expressly contemplated packer as the forwarding agent to whom the seller was to deliver the goods and therefore the transactions were exempt as coming within the rule.

We have said that the transactions here involved were not within the constitutional ban on state taxation. If that be so, then the board rule could not grant an exemption. Exemptions require legislative action. (Market Street Railway Co. v. Calif. State Bd. of Equal., 137 Cal. App. 2d 87, 100-101). In any event the rule does not help respondents. Packer was not a forwarding agent, but was merely engaged in packaging goods preparatory to shipment out of the country.

In 1955 the legislature added Section 6387 to the Revenue and Taxation Code, which provides as follows:

> "There are exempted from the computation of the amount of the sales tax the gross receipts from sales of tangible personal property purchased for use solely outside this State and delivered to a forwarding agent, export packer, or other person engaged in the business of preparing goods for export or arranging for their exportation, and actually delivered to a port outside the continental limits of the United States prior to making any use thereof."

No retroactive application can be given to this section, for to do so would bring about gifts of public money. (Calif. Const., Art. IV, Sec. 31; Estate of Stanford, 126 Cal. 112.) It is argued that the section was merely a clarification of Section 6352 of the code, hereinbefore quoted, which exempts from taxation transactions which the state is prohibited from taxing. If these goods never entered export before becoming subject to taxation, Section 6352 has no application, for neither the state laws nor the federal laws nor the federal Constitution then prohibits their taxation. Furthermore, it is a well established rule of statutory construction that the enactment of a new statute indicates an intention on the part of the legislature to change the prior law rather than to merely interpret or clarify it. (Whitley

v. Superior Court, 18 Cal. 2d 75; Young v. Three for One Oil Royalties, 1 Cal. 2d 639; Loew's Inc. v. Byram, 11 Cal. 2d 746.) We think the new section was new legislation exempting, after it took effect, some transactions that had been taxable under the existing law.

For the reasons given, the judgment appealed from is reversed, with instructions to the trial court to enter a judgment in favor of appellant.

VAN DYKE, P. J.

We concur:

SCHOTTKY, J.

PEEK, J.

Filed: Dec 1—1958, L. A. ENDRES, *Clerk*

## *Appendix D*

*In the Superior Court of the State of California,*
*In and For the County of Sacramento*

No. 92473

Gough Industries, Inc., a Corporation,
Plaintiff,

vs.

State Board of Equalization, an agency of the State of California,
Defendant.

### MEMORANDUM OPINION

This is a complaint for recovery of certain sales tax paid by plaintiff after notice of determination under the "Sales and Use Tax Law of the State of California." Plaintiff filed a timely claim for refund which was denied.

The point in issue in this case is whether or not the tangible personal property, which was sold by plaintiff to a purchaser in Saudi Arabia, was exempt from such state taxation under the federal constitutional exemption where the property is considered an export. Plaintiff claims that these goods were exports and not subject to state taxation. The State takes the opposite view.

There was a stipulation of facts in the case. The facts have been very fairly stated by both parties in their briefs and this Court sees no need to detail them in full. Plaintiff manufactures and sells certain electric products. In 1949 they sold goods to the Arabian American Oil Company and Trans-Arabian Pipeline Company (called purchasers) for use in Saudi Arabia. There is no question but what it was

the express intention of the parties that these goods be sent by the plaintiff to the purchaser abroad. No question arises about any concealment or any change of plans with regard to any of this shipment. The purchase orders stated that ocean transportation had been arranged and required the date of export to be stated, and made certain specific conditions a part of the purchase. While title passed to the purchasers in California, plaintiff was instructed to deliver the goods to the purchasers, care of the Foreign Trade Export Packing Company, Wilmington, California, for export packing and forwarding. (We will call this firm the packers hereafter.)

The goods thereafter were carried by truck from plaintiff's properties in Los Angeles to Wilmington, California, where the packers packed them for overseas shipment. When this packing operation was completed, the goods were again placed upon trucks and shipped to the ocean carrier. They were then carried across the seas by ship.

The question involved in the case is this: When did the export journey begin?

It is well settled that the mere intention to export personal property does not, standing by itself, cause the same to be considered an export.

(See cases cited in briefs)

It is therefore necessary for some overt act to take place to cause goods to be considered in export. From here on we have considerable difficulty. It seems almost impossible to discover a very well defined rule of thumb that will take care of all the myriad of diverse factual details existing in this type of transaction. One of the best known and perhaps the earliest leading case on this subject is that of *Coe v. Errol*, 116 U.S. 517, where the definition states that goods are in foreign commerce when they have "actually started

in the course of transportation to another state or delivered to a carrier for transportation." In the Coe case, logs were floated down a river in Maine and the owner stopped them for about a year and then later were to send them to their destination in New Hampshire and before they commenced the journey to New Hampshire the logs were taxed as taxpayers property in Maine and the Court upheld the tax. This case has given rise to innumerable cases on the subject of the doctrine of stoppage in transitu. It, of course, is common knowledge that on a long trip there may arise certain reasons why goods have to be stopped and held in certain places, and, depending upon the factual situation in each case, the Court must decide whether the export journey has actually been broken, providing it has been commenced at all, or whether the interruption would be a natural result of a certain type of transportation. A test has also been put forth to the effect that if the goods can be still circulated in the state of origin they are subject to tax. (See cases in briefs) This doctrine, however, appears to be more theoretical than real.

It seems to this Court that the problem should be approached from a practical and realistic attitude. In our present fast moving economy we know that to complete a journey from this country to Saudi Arabia involves transportation by truck, by truck again after packing, by ocean going vessels, and, it will be assumed, by truck of some type after the vessel docks in the Eastern Mediterranean or in the Gulf of Aden, or wherever the terminal port may be.

The Attorney General impliedly concedes that if the packing was done at the site of plaintiff's own factory and if the goods were then placed in a long range cargo plane for refueling in the air and a nonstop flight to Saudi Arabia, that this would undoubtedly be an export journey. But the State claims that here the plaintiff merely sent these goods

to another company in the same State of California and there the packer performed certain work upon the goods to get them ready for ocean travel, and that the export journey did not commence until at least the time the goods left the packer. Plaintiff's answer to this is that the packing was clearly incidental to the main journey; that it is common knowledge that most tangible personal property must be specially packed for a long ocean voyage and particularly electrical supplies in order to insure their being in proper condition upon arrival.

The Attorney General lays great stress on the case of *Empresa Siderurgica, S.A. et al., v. County of Merced*; 337 U.S. 154. Here there was a cement plant in Merced County which was sold to a Colombia corporation for export to South America. A company was employed to do dismantling and packaging of the cement plant. The part of the plant that had been dismantled was taxed, but had not started on any journey. The Court said in that case

> "The part of the plant that is taxed was dismantled, but it had not been delivered to any carrier for export or otherwise started on its journey on the tax date."

The packer involved in the Empresa case performed its services at the original plant. However, in the case at bar goods left the property of plaintiff and were sent to Wilmington for the packing.

If in the instant matter is was the plan of operation of plaintiff that as soon as it manufactured its appliances, it would send a certain percentage of them to the packers for overseas shipment upon the basis of their own statistics showing that a certain percentage went overseas and a certain percentage went overland and that this was done far in advance of any time that the goods were actually later shipped from the packer to the purchaser, then we

would say that the case would come within the provisions of the *Coe v. Errol* supra. However, it seems to this Court that here we have all the indicia of a specific journey of specific goods. Obviously those goods had to leave plaintiff's property and arrive in Saudi Arabia. There is no law that makes it mandatory that a certain type of transportation must be used. The good faith of the parties is unquestioned and just as soon as the packing was completed the goods were forwarded by further trucks to the ocean going vessels. This case therefore does not come within the purview of the many cases which hold that if the stoppage in transitu is caused by the seller, the trip may said to have been concluded as far as the State is concerned and the goods may be taxed, even though it may be said that the export journey had actually started. If there were anything in the record to show that plaintiff here had endeavored to hold these goods for an unreasonable length of time at the packers place of business or that its procedure was that in certain places the goods were recalled even after being packed and sent back to Gough and unpacked and sold to the public in California, then we would have something upon which to base a doctrine either (1) that the export journey had never started (the contention of the Attorney General here) or (2) that if it had started it was stopped in transitu.

We have neither those situations here. We have the passing of certain tangible personal property in as speedy and proper a pattern as is commensurate with our fast moving economy. The goods had to be packed for overseas shipment. This Court feels that this packing was an incidental part of the export journey rather than being considered the primary station for the take off. While, of course, the intention of the parties, as we stated above, does not of itself render the goods in export commerce, at the same time these facts are certainly to be taken in consideration with the

actual corporeal movement of the goods in determining this question. Many cases cited by the Attorney General quite properly hold that there must be a launching into the export stream to constitute the goods as being on their export journey. All the cases state that that export journey starts when there is a delivery to the carrier *or* (and this disjunctive is present in nearly every decision) *have started upon such transportation in a continuous route or journey.* Therefore, our problem is what is *continuous.* Obviously these goods had started to move. It is true that moving from the plaintiff's place of business to the packer was all inside the State of California, but was the continuity broken because certain necessary packing had to be done for overseas shipment? It seems to this Court that we have to take *into consideration all of the facts in each individual case* and lift it up by its four corners, so to speak. After reading most of the cases cited by both counsel in their briefs this Court believes that the difficulty is not in attempting to lay down a formula, but in applying that formula to different factual backgrounds which may exist.

When our higher Courts speak of "continuous voyage" it doesn't seem to this Court that they mean to infer that the goods must be actually physically moving at all times during the procedure. If this were the case then packing operations would have to be done during truck trips or ocean trips or airplane trips. It seems to this Court that what is meant by the higher Courts is that a continuity of the voyage is ended when we can say as reasonable men that that trip is over and concluded and another trip starts which is independent of the first trip. It is somewhat similar to the difficulties we have in explaining the term proximate cause. If there is an "efficient intervening cause" then this breaks up the chain. If the intervening cause is not efficient and is

merely suspensory, then the original cause still remains the proximate cause of the end result.

In the stipulation on file herein, paragraph 7½, it is agreed that the products forwarded by plaintiff to the packer covered by one purchase order were not consolidated for packing with products forwarded by plaintiff to packer under any other purchase order nor were they consolidated for packing with other suppliers of the purchasers, so that in all these cases the goods could be very carefully traced and at no time in the opinion of this Court was the journey actually slowed down by any intervening and outside cause or source nor was it unreasonably delayed in any fashion.

It would seem therefore that the export journey started when the goods left plaintiff's property and were not subject *to California tax.*

In view of the Court's ruling on this issue it would seem unnecessary to consider the other points raised by the plaintiff, namely,

1. Were these sales exempt under certain regulations of the Board and

2. Were they exempt under sections of the Revenue and Taxation Code.

Let findings and judgment be prepared in accordance herewith.

Dated: June 26, 1957.

JOHN QUINCY BROWN
*Judge of the Superior Court*

[Endorsed:] Filed Jun 26 1957 C. C. LARUE, *Clerk* G. L. SWITZER, *Deputy Clerk.*

*In the Superior Court of the State of California, in and for the County of Sacramento*

No. 92473

Gough Industries, Inc., a Corporation,
Plaintiff,

vs.

State Board of Equalization, an agency of the State of California,
Defendant.

## JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury; Messrs. Pillsbury, Madison & Sutro appeared as counsel for plaintiff, and the Attorney General of the State of California appeared as counsel for defendant; and the Court having read the pleadings, stipulations of facts and briefs of the respective parties, and the Court being fully advised in the premises, and having filed herein its memorandum opinion and its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith:

Now, Therefore, by reason of the law and findings aforesaid:

It is hereby *Ordered, Adjudged and Decreed:*

1. That plaintiff have judgment against defendant in the sum of one thousand nine hundred twenty-one and eighty-one one-hundredths dollars ($1,921.81), with interest thereon at the rate of six per cent (6%) per annum from the 25th day of August, 1952, until the date of allowance of credit on account of the judgment or to a date preceding the date of the refund warrant by not more than thirty (30) days, as

provided in sections 6935 and 6936 of the Revenue and Taxation Code.

2. That plaintiff have judgment against defendant for the costs herein taxed at Thirteen dollars ($13.00).

Dated: August 6, 1957.

JOHN QUINCY BROWN
*Judge of the Superior Court*

Attest: C. C. LARUE, *Clerk* by G. L. SWETZER, *Deputy.*

Entered, August 7, 1957. Book: 139 page 509 C. C. LARUE, *Clerk* by W. BOND, *Deputy.*

[Endorsed]: Filed August 7, 1957, C. C. LARUE, *Clerk* by G. L. SWETZER, *Deputy.*

*In the Supreme Court of the State of California*

Sac. No. 6879

Gough Industries, Inc. (a Corporation),
Plaintiff and Respondent,

vs.

State Board of Equalization,
Defendant and Appellant.

On appeal from the Superior Court in and for the County of Sacramento Superior Court #92473

*The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,*

It Is Ordered, Adjudged, and Decreed *by the Court that the* JUDGMENT *of the Superior Court in and for the County of* Sacramento *in the above entitled cause, be and the same* is *hereby* affirmed.

RESPONDENT TO RECOVER COSTS ON APPEAL.

*I,* William I. Sullivan, *Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the* 13th *day of* March, *1959, and now remaining of record in my office.*

Witness *my hand and the seal of the Court, affixed at my office, this* 13th *day of* April, *A.D. 1959.*

William I. Sullivan, *Clerk*
*By* R. Formichi, *Deputy*

## Appendix E

No. 34113

*Supreme Court of Washington*
Department 1—July 11, 1957.

Eardley Fisheries Company, Inc., a Washington corporation, Appellant,

v.

The City of Seattle, a municipal corporation, Respondent.

### CONFLICTING OPINION

For the taxpayer: Ryan, Askren & Mathewson.
For Seattle: A. C. Van Soelen and C. V. Hoard.

Ott, J.—This is an appeal from a judgment of the superior court which denied a refund to appellant of the business and occupation tax paid under protest to the city of Seattle.

The facts are substantially as follows: The United States government, through the office of the quartermaster general of the army, issued an invitation to bid to supply the army with specified frozen sea food for export. The appellant, Eardley Fisheries Company, Inc., a Washington corporation having its principal place of business at Seattle, was notified that it was the successful bidder. The government's purchase orders provided that the commodities purchased were "'For Export,'" and were to be packed, marked, and delivered in conformity with its requirements for export purposes, and that the government would accept deliveries at designated cold storage depots located within the state of Washington. The contracts required that the perishable commodities be kept under refrigeration by the seller until delivery.

Upon receipt by the purchaser, the commodities were further processed by quick-freezing at zero temperature, in preparation for export shipment. Upon requisition by the overseas units of the United States, and the arrival of vessels having sufficient refrigeration facilities, the sea food was transported to overseas bases and installations of the United States.

These commodities purchased by the United States were kept in storage and stock-piled for variable periods of time (from ninety to one hundred twenty days), awaiting shipment overseas. Local cold storage and transportation abroad were furnished by the purchaser. The goods with which we are concerned were all shipped overseas in accordance with the intention of both contracting parties.

Under ordinance No. 72630, the city of Seattle imposed a business tax based upon the gross sales of the appellant in the above transactions.

On appeal, the appellant contends that the application of this taxing ordinance was in violation of Art. I, § 10, clause 2, of the United States constitution, which provides in part as follows:

> "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The sole issue on appeal is whether or not the tax here imposed constituted a tax upon exports, repugnant to the constitution. (The exception with reference to execution of inspection laws is not urged by either party as being applicable to this case.)

The transactions between the appellant and the United States government began and terminated within this state. The seller's responsibility with reference to the commodities ended upon delivery to the purchaser in accordance

with the terms of the contracts. The invitation to bid, the bid, the acceptance of that bid, the delivery and acceptance of the goods, and the passage of title to the commodities, all took place within the state of Washington.

By this process, had the goods entered into the stream of exportation, thereby rendering them immune from local taxation?

In the determination of this issue, we follow the decisions of the United States supreme court. These decisions have announced certain rules as a guide for our determination of this question.

The fact that the parties intended that these goods would be exported, and the fact that they were exported, are not decisive. As was said in *Empresa Siderurgica, S.A. v. County of Merced*, 337 U.S. 154, 157, 93 L.Ed. 1276, 69 S. Ct. 995 (1949):

> "So in this case it is not enough that on the tax date there was a purpose and plan to export this property. Nor is it sufficient that in due course that plan was fully executed."

See, also, *Joy Oil Co. v. State Tax Comm.*, 337 U.S. 286, 93 L.Ed. 1366, 69 S. Ct. 1075 (1949).

The carrying of the product to a depot where the journey is to commence is not a part of the export journey. *Coe v. Errol*, 116 U.S. 517, 29 L.Ed. 715, 6 S. Ct. 475 (1886).

There must be some action on the part of the seller which irrevocably places the goods in their final movement out of the country. *Cornell v. Coyne*, 192 U.S. 418, 48 L.Ed. 504, 24 S. Ct. 383 (1904).

Further, there must be a *certainty* at the time the tax accrues that the goods will be exported. This certainty can be established by one of two methods:

(1) Where there is a delivery by the seller to a carrier for shipment abroad. *Richfield Oil Corp. v. State Board,*

329 U.S. 69, 91 L.Ed. 80, 67 S. Ct. 156 (1946); *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 67 L.Ed 865, 43 S. Ct. 485 (1923). As was said by Justice Douglas in *Empresa Siderurgica v. County of Merced, supra:*

"'. . . goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey.' *Coe v. Errol*, 116 U.S. 517, 527. That test was fashioned to determine the validity under the Commerce Clause of a nondiscriminatory state tax. But as we noted in *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 79, it is equally applicable to cases arising either under Art. I, § 10, Cl. 2 (the Import-Export Clause) or under Art. I, § 9, Cl. 5, which prohibits Congress from laying any tax on 'Articles exported from any State.'

"Under that test it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. See *Turpin v. Burgess*, 117 U.S. 504; *Cornell v. Coyne*, 192 U.S. 418. The tax immunity runs to the process of exportation and the transactions and documents embraced in it. *Fairbank v. United States*, 181 U.S. 283; *United States v. Hvoslef*, 237 U.S. 1; *Thames & Mersey Ins. Co. v. United States*, 237 U.S. 19. Delivery of packages to an exporting carrier for shipment abroad (*Spalding & Bros. v. Edwards*, 262 U. S. 66) and the delivery of oil into the hold of the ship furnished by the foreign purchaser to carry the oil abroad (*Richfield Oil Corp. v. State Board, supra*) have been held sufficient. It is the entrance of the articles into the export stream that marks the start of the process of exportation. *Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.*" (Italics ours.)

(2) The character of the commodity may also establish certainty that it will enter the stream of foreign commerce. Where, for all practical purposes, the commodities could be used only abroad and could serve no domestic purpose, it could then be said that the goods were irretrievably committed to export. As was said by Justice Frankfurter in *Joy Oil Co. v. State Tax Comm., supra:*

> "While in storage, the gasoline might have been diverted to domestic markets without disruption of any existing arrangement for its transshipment and without even breach of any contractual commitment to a foreign purchaser. *Neither the character of the property nor any event equivalent to its redelivery to a common carrier made export certain for all practical purposes.* See *Richfield Oil Corp. v. State Board*, 329 U. S. 69, 82.
>
> "The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services. See *Coe v. Errol*, 116 U. S. 517, 527-28." (Italics ours.)

Appellant strongly relies upon two Federal authorities: (1) *A. G. Spalding & Bros. v. Edwards, supra*, in which Justice Holmes said:

> "The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result. . . . Neither does it matter that the title was in Scholtz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. . . . Theoretical possibilities may be left out of account."

(2) *Richfield Oil Corp. v. State Board, supra.* This opinion was written by Justice Douglas, who was also the author

of the *Empresa Siderurgica* case, *supra*, and in the latter case, both the *Spalding* and the *Richfield* cases were distinguished as instances where the seller delivered the commodity aboard ships destined for foreign ports. Under such circumstances, the court held that the certainty of export test had been met.

The Federal cases relied upon by appellant are distinguished by the interpretation placed thereon by a later decision of the same court.

The appellant also cites a case from our own jurisdiction, *Alaska S. S. Co. v. State*, 31 Wn. (2d) 328, 196 P. (2d) 1001 (1948). In that case, this court determined that a steamship sold to a foreign purchaser was its own "carrier," and that there had been an actual *commitment* of the steamship to foreign service before it left Washington waters, by the change of its maritime registry to that of a foreign vessel and placing a foreign flag aboard while it was still moored in a Washington port. Our decision in the *Alaska Steamship* case meets the test of certainty as announced by the most recent decisions of the United States supreme court on this question.

These cases do not sustain appellant's position.

Applying the above rules to the instant case, the certainty of export of the commodities was not established by appellant. At the time the tax accrued, the delivery had been made to local storage depots, and not to carriers destined for abroad. There was a possibility, within the purview of the rules, that these goods might find their way into domestic commerce. The goods were of a character that made their domestic use possible. This is supported by the court's finding, in the instant case, that similar items, so packed, stored, and purchased from appellant, were domestically consumed.

We conclude that, at the time of delivery of the sea food